United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6003

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-6003

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

v.

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,

Defendant-Appellant,

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

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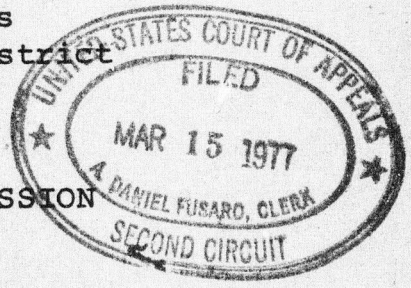

BRIEF FOR PLAINTIFF-APPELLEE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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BRIEF FOR PLAINTIFF-APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATEMENT OF THE CASE

This is an appeal from the Affirmative Action Program and Orders of the United States District Court for the Southern District of New York (Werker, D.J.) entered November 13, 1975 (A. 1373-

1401) and revised and modified on January 17, 1977 (A. 1833-1861).

The program was promulgated pursuant to a judgment of the district court (opinion reported at 401 F.Supp. 467) which was, for the most part, affirmed by this Court with an opinion reported at 532 F.2d 821. After a series of meetings, at which the parties could not reach agreement, the Administrator submitted to the district court a proposed program (A. 1335-1362). The district court approved the program with modifications (A. 1364-72). The union and JAC appealed from that order. After its brief had been filed, the Equal Employment Opportunity Commission and the City of New York, with the consent of appellants, sought and obtained from this Court a remand of the cause since economic conditions required some modifications of the program. The modified program was approved by the district court on January 19, 1977 (A. 1835-1861).

The union and JAC, on this appeal, challenge the modified program to the extent that it (1) creates a tripartite board to administer a journeyman test for admission to the union; (2) provides for direct admission of persons with four years' experience; (3) grants eligibility for the above methods of admission to persons residing in counties outside of but near New York City; (4) provides for reduction and installment payments of initiation fees; (5) provides supervision by the Administrator of the number of apprentices to be indentured; and (6) provides a system designed to equalize work opportunities among the apprentices.

QUESTION PRESENTED

Whether the various aspects of the affirmative action program challenged by the union and JAC lie within the area of discretion of the district court to fashion effective remedies under Title VII.

STATEMENT OF FACTS

The affirmative action program here challenged is designed to implement the judgment of the district court (opinion reported at 401 F.Supp. 467), which was for the most part affirmed by this Court in EEOC v. Local 28, 532 F.2d 821 (2d Cir. 1976). This Court there affirmed the findings of the district court that Local 28 and its Joint Apprenticeship Committee (JAC) had engaged in a pattern and practice of discrimination against non-white (black and Spanish-surnamed) individuals, blocking for minorities all four routes of entry into the local.[1/] This Court found discrimination in the operation of the apprentice program by use of discriminatory non-validated tests and nepotistic practices, and even more blatant discrimination with respect to other means of admission into the union (532 F.2d at 826). With respect to

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1/ The four means of admission to the union are the apprentice program, a journeyman's test, transfer from a sister local, and employment by newly organized sheet metal contractors.

relief, this Court in its opinion approved the imposition of a 29% goal of minority admission and a provision for the giving of annual tests for apprentices and journeymen. It also approved the appointment of an administrator with broad powers over Local 28 and the JAC, noting that the need for "strict enforcement seems thoroughly justified by the union's past recalcitrance and the requirements of Title VII" (532 F.2d at 829).

This Court disapproved a requirement for the displacement of one JAC representative by a minority person and the fixing of a ratio for admission of minorities to the apprentice program on the basis of a validated test. With respect to the ruling against a ratio on apprentices, this Court's opinion noted that, as a result, a "heavy burden" would be placed "upon direct qualification and admission and transfer from allied unions" in order to reach the 29% goal. It found this result justified because the "persons who are presently eligible for transfer into Local 28 are the persons who have felt the brunt of the union's

prior discriminatory practices." 532 F.2d at 837.

A. Conditions for Direct Admission Into the Union

1. In order to achieve direct admission into the union, the program under attack provides that the union will administer a non-discriminatory, "hands-on" (i.e. practical) test under the overall supervision of the Administrator no later than March 1, 1978, and at least once a year thereafter, although the frequency may be diminished, if consistent with the interim goals of the plan (Par. 5, A. 1838). To qualify for such test, the applicant must have had at least one year's experience in sheet metal work (Par. 7, A. 1839). The test is to be graded by a tripartite board of three persons knowledgeable in sheet metal, one chosen by Local 28, one by the Administrator, and one by the plaintiffs (Par. 10, A. 1841).

In adhering, in the amended program, to the original provision for a tripartite board, the Administrator explained that, without a board, he would need an expert to advise him on technical

matters and that plaintiffs would also probably need an expert. It would, he said, seem "far more logical, and efficient, to have an expert board which can resolve disputes among themselves" (A. 1782-1893).

2. The original judgment and order of August, 1975, which this Court affirmed, provided that the Program may (Par. 22(b), A. 143):

> Under terms and conditions to be established in the Program or by the Administrator, require Local 28 to admit as full journeyman members all non-whites who apply in writing and have four years experience as a sheet metal worker in the United States, or elsewhere, in construction or industrial sheet metal work as an employee of a union or non-union employer, or have been employed in other sheet metal work, including but not limited to: employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association; sheet metal experience in the Armed Forces; or, vocational training related to the skills of a journeyman sheet metal worker.

The program provides that persons with four years' experience in sheet metal work, who establish to a tripartite board that they do have the

requisite experience, are to be admitted to the union directly (Par. 12, A. 1842). In adhering to this provision in the amended program, the Administrator pointed out that even the local admitted that some qualified applicants have difficulties in a testing situation and that experience with the 1975 journeyman's test showed it to have been administered under conditions which, although they did not evidence an intent to create a hostile environment, were "certainly not ideal" (A. 1784). He also noted that the justification for the four-year experience program was augmented by the delay resulting from the fact that the next journeyman examination would not be held until March, 1978 and, at most, annually thereafter. He saw no reason why a person who has the requisite skills should be subject to these delays (A. 1788).

3. Eligibility for direct admission under either of the methods discussed above is, under the program, limited to residents of New York City or one of the nearby counties (Par. 7(c), A. 1839; Par. 12(a), A. 1842).[2/] In approving a similar provision of the original program the district court noted that:"If it be true that many of the present membership reside outside the limits of New York City, there is no reason why applicants should be restricted to the city" (A. 1367).

4. The program also includes a provision for reduction of the journeyman initiation fees and deferred payment of such fees by non-whites, upon application to the Local's Executive Board and review by the Administrator (Par. 13, A. 1843-1844). The Administrator pointed out in his report (A. 1787) that this provision is a direct carryover from paragraph 22(d) of the original order and judgment

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2/ For the hands-on journeyman test, the counties listed are Nassau, Suffolk and Westchester in New York, and Essex and Passaic in New Jersey (Par. 7(c), A. 1839). The four-year experience qualification also includes residents of Bergen, Hudson and Union counties in New Jersey (Par. 12(a), A. 1842).

of August, 1975 which was upheld by this Court.

That judgment provides the program may (A. 143-144):

> Under terms and conditions to be established in the Program or by the Administrator, require and direct that non-whites admitted to journeyman status in Local 28 through the procedures set forth in paragraphs 21(a) 21(b), 22(b) and 22(c) supra, shall pay an initiation in an amount not to exceed the amount of the lowest initiation fee charged to any white individual who was admitted to membership at the time the non-white would have been eligible for membership in Local 28 absent Local 28's and/or JAC's discrimination, including discriminatory admission requirements, against non-whites. In addition, the Administrator may direct that payment by non-whites of the aforesaid initiation fees shall commence with their employment with a Local 28 contractor and shall be paid in such monthly installments as determined by the Administrator.

Paragraph 43 of the program provides that nothing contained therein shall be construed as preventing the Executive Board of the union from adopting portions of the program "for the benefit of whites and other minorities" if such plans do not interfere with the program (A. 1861).

B. The Apprentice Program

1. Although the original program had provided for the admission of a fixed number of apprentices each year, the final program provides only for the admission of 36 by February, 1977. It directs another class by July, 1977 and semi-annual classes thereafter, the number to be determined in the first instance by the JAC upon consideration of the goals of the program and the availability of employment opportunities. The number fixed by the JAC is subject to review by the Administrator who has the final authority to determine the appropriate number of apprentices to be indentured (Par. 19(b), A. 1846). The number includes those apprentices admitted to advanced standing (Par. 19(c), A. 1846).[3/]

3/ The original judgment of August 1975, directed the admission of non-whites with sheet metal experience into the apprentice program with advanced standing (Par. 22(c), A. 143). The program provides for such advanced standing admission to those with at least six months' experience who cannot perform at the journeyman level. At the direction of the district court, the program directs that candidates must pass the aptitude test. They are to be assigned a grade level based on experience, conditional for a period to be determined by the Administrator (Par. 29-32, A. 1852-1854).

The Administrator, in his report, stated that no one "seriously questions the proposition that if new apprentices are not started in the pipeline now, then four or five years from now Local 28 will be little further along in reaching its ultimate goal than it is today" (A. 1789). In declining to fix a ratio of apprentices to journeymen, he noted that, since apprentice employment opportunities are under control of the employers, there was no way to insure that all indentured apprentices would receive sufficient on-the-job training to keep them from dropping out of the program. He said that in "weighing this factor, against the uncontested fact that the apprenticeship program is the major entry method into sheet metal work," some balance had to be reached (A. 1791). It was by such balancing that he recommended the initial class of 36 for February, 1977 (A. 1791).

2. The Administrator was of the view that, to insure equal opportunity for employment of apprentices, a formal referral system was necessary (A. 1794). To that end, he incorporated in the program a provision

for grouping apprentices according to classes with a record for each apprentice of the number of manhours worked. Apprentices are to be referred out in inverse order to the number of manhours worked. The JAC is directed, to the extent feasible, to rotate the groupings to insure that no one grouping receives a disproportionate share of the work (Par. 20(c), A. 1847).

In concluding his final report, the Administrator stated (A. 1801-1802):

> In arguing against both the original AAPO and the Revised AAPO it is patently obvious that Defendants do not want to have their conduct subject to ongoing scrutiny. Local 28 argues that it has only one real obligation, to reach a 29% goal by 1981. The long litigation history of Local 28, dating back to 1964, which resulted in a non white population of only 3.19% in July 1974 and approximately 5.77% in December 1976 leads to the conclusion that vigorous efforts must be made to insure that non whites are afforded the same type of union membership and employment opportunities afforded to whites in the sheet metal trade.

* * *

> The Defendants herein have let no opportunity go by to challenge the Court's Orders as burdensome and costly. Such arguments may serve to shape available remedies, but they do not serve to relieve Defendants of their liability for their wrongful conduct. The Revised AAPO sets forth a flexible, realistic program which meets the purposes of the Court's Order and Judgment, as well as the guidelines of the Circuit Court.

ARGUMENT

The framing of a decree to remedy the injuries found in light of the particular facts of the case is primarily the function of the district court. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); International Salt Co. v. United States, 332 U.S. 392 (1947); Rios v. Enterprise Association, 501 F.2d 622, 631 (2d Cir. 1974). Here, as noted in the Statement of Facts, this Court has already approved the broad outlines and, indeed, some of the specific provisions of the program which the appellants attack. It also has affirmed the necessity for the appointment of an Administrator to particularize and control the implementation of

the decree. The program which appellants attack is eminently reasonable and in line with the guidelines already established by this Court.

1. The Tripartite Board

The Union does not, and could not, in the light of this Court's prior opinion, challenge the direction for the giving of a hands-on journeyman test to persons with at least one year's experience in sheet metal work. It objects to the creation of a tripartite board of persons knowledgeable in sheet metal to grade the test. However, as the Administrator explained in his report, the duty of grading a practical examination requires expertise in sheet metal which the Administrator does not possess. An independant tripartite board of experts is a reasonable method of assuring fair administration and grading of the test. The use of a tripartite board (in place of a committee of three union officers which previously had the responsibility for determining eligibility for direct admission)[4/] was

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4/ See United States v. Enterprise Association, 360 F.Supp. 979, 985 (S.D. N.Y. 1973)

approved by this Court in Rios v. Enterprise Association, supra, 501 F.2d at 634.

The tripartite board is not replacing an "established" examining board of Local 28. A former president of Local 28, Mel Farrell, testified before the City Commission on Human Rights in 1967 that there was no examining board because two of the members of the previous board had died, the third member had retired, and replacements had not been named (A. 950-953). Robert Schluter, who was chairman of the examining board for the 1968 and 1969 journeyman's tests, testified at the trial of this action that, at the time he and the other members of the board were appointed just prior to the 1968 test, he was not sure whether Local 28 even had an examining board. An examining board had not performed any function in four or five years prior to his appointment (A. 157). Schluter further testified that as of the time of the trial of this action in January, 1975, he did not know whether he was still chairman of the examining board (A. 157).

In any event, under the Rios decision, supra, it would be within the authority of the district court to displace an existing system which had been found to be operating in a discriminatory fashion. Contrary to the union's contention that previous examining boards had not engaged in discriminatory conduct, the district court found in this case, and this Court affirmed, that the 1968 test was discriminatory. See, 532 F.2d at 825. There was no equivalent finding as to the 1969 test because the court was unable to measure whether the 1969 test was discriminatory because of the union's failure to keep adequate records, but the Union had not even attempted to validate that test. See 401 F. Supp. at 844. In view of this Court's finding of blatant attempts by the union to block minorities from all avenues of entry into the union, the need for an independent evaluation of the journeyman test is evident.

There is no "reverse discrimination" in the creation of the board. The program does not mandate

the selection of a minority but only of a person knowledgeable in sheet metal. The fact that, in choosing a person knowledgeable in sheet metal, the parties found a minority with such qualifications does not show discrimination.

2. Direct Admission with Four Years' Experience

The provision for direct admission of persons with four years of sheet metal experience was, as the Administrator noted, included in the original judgment which this Court affirmed. (See Statement of Facts, supra, pp. 7-8) The program creates safeguards, in the form of a tripartite board, to assure that the persons so admitted do in fact have the requisite experience. There is no reason why persons with that much experience--four years against one year of experience for the journeyman test--should be required to take a test. As this Court noted in its prior opinion (532 F.2d at 837), it is the older minority workers who have borne the brunt and the union's exclusionary policies. Since that is the group which is most likely to find a testing atmosphere stressful, it is reasonable to allow their experience

to speak for itself.

The union's presently expressed concern that the test will dilute the ratio of minority admissions (Supp. Br. pp. 10-11) ignores the fact that it was minorities, including the working groups which Local 28 refused to organize, who bore the brunt of the union's exclusion.

3. The Residency Requirement.

It was reasonable to permit persons living in counties surrounding New York City to apply for membership in Local 28. As the district court noted in upholding this provision, since many of the present membership reside outside the limits of New York City, there is no reason why minorities similarly situated who have been previously excluded by the union, should be restricted. The record in this case shows that Local 28 never had a residency requirement limited to New York City and that many of its members, including present and former officers of the union, reside outside of the city (Plaintiff's Ex. 24, pp. 5-7, 27-47; Plaintiff's Ex. 31, pp. 1-2,

(A. 971-972).

4. Reduction and Deferment of Initiation Fees

As noted in the Statement of Facts, supra, pp. 9-10, the provision for reduction and deferred payment of initiation fees was included in the judgment which this Court has already approved. It is a reasonable method of assuring that the minorities who have already suffered the results of their exclusion from the union will not be barred from gaining admission by their inability to meet the high cost of initial entry. The provision is not automatic, but requires application to the Executive Board of the union, with review by the Administrator. There is no reverse discrimination in the provision. Local 28 is free to apply the same provisions to whites. Indeed, the record shows that Local 28 has previously permitted individuals to defer payment of initiation fees (Stipulation of Fact No. 27, A. 1068).

5. Indenturing of Apprentices

As appears from the Administrator's report, the matter of fixing the number of apprentices to be

indentured was a matter of grave concern to which the Administrator gave very careful attention (A. 1780-1791). The need for training of future workers in the sheet metal industry had to be balanced against current economic conditions. Because of that fact, the Administrator fixed the number of only the first class of apprentices at the very modest figure of 36. The authority to require the regular indenture of a minimum number of apprentices is established by the Rios decision, supra, 501 F.2d at 626.

The Administrator left the size of future classes for determination in the first instance by the collective bargaining process. Appellants' argument that the Administrator should have no part in the decision as to the number and frequency of apprentice classes is merely a reiteration, in different form, of the argument previously rejected by this Court that there is no need for an Administrator at all. Manifestly this major method of entry into the union must, in view of the union's prior conduct, be subject to

some oversight. The appellants offer no reasonable basis for overturning the carefully exercised discretion of the Administrator and the district court.

6. Sharing of Work By Apprentices

Similarly, the appellants offer no adequate reason for upsetting the carefully considered determination by the Administrator and the district court as to the methods to be used to insure that apprentices are given a fair share of work opportunities. The ability to get work is obviously a matter of considerable importance in keeping apprentices from dropping out of the training program. Fair allocation of such opportunities is therefore essential. The direction for grouping and rotation ordered by the Administrator is a reasonable attempt to achieve that result.

The system established by the program does not abrogate any existing seniority system. Counsel for the Contractor's Association, in objecting to a suggestion by the City, stated that seniority "has

never been the practice in the industry" (A. 1493). In any event, since minorities are only recently gaining admission to the apprentice program in any substantial number (See Stipulation of Fact 81, A. 1080), a system which, in the guise of seniority, would keep the newly admitted minorities from obtaining work, is subject to modification to assure equality in work opportunity. See United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971); United States v. International Brotherhood of Elevator Constructors, 538 F.2d 1012, 1018 - 1020 (3rd Cir. 1976).

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the court below be affirmed. Indeed, the various aspects of the program which appellants attack are so clearly a reasonable exercise of discretion as a method of implementing the judgment which this Court has

previously affirmed that, we respectfully suggest, it would be appropriate to affirm the order summarily, without the necessity of argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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